SECURITIES AND EXCHANGE COMMISSION
Release No. 34-55604; File No. SR-NASD-2006-109

April 9, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Relating to Representation of Parties in Arbitration and Mediation

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution") filed with the Securities and Exchange Commission ("SEC" or "Commission") on September 14, 2006, and amended on November 9, 2006 (Amendment No. 1)[3] and February 23, 2007 (Amendment No. 2),[4] the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Dispute Resolution. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Dispute Resolution is proposing to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code"), the Code of Arbitration Procedure for Industry Disputes ("Industry Code"), and the NASD Code of Arbitration Procedure

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 Amendment No. 1 makes clarifying changes to the rule text emphasizing that attorneys may represent parties in NASD's forum, unless state law prohibits such representation. Amendment No. 1 also makes several clarifying and technical changes to the proposed rule filing.

4 Amendment No. 2 makes clarifying changes to the rule text concerning restrictions on non-attorney representation. Amendment No. 2 also includes minor organizational changes to a paragraph and footnotes describing the American Bar Association Model Rule of Professional Conduct 5.5.

("Code") to address representation of parties in arbitration and mediation.[5] Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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Customer Code

12208. Representation of Parties

(a) Representation by a Party

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

(b) Representation by an Attorney

At any stage of an arbitration proceeding held in a United States hearing location, [All] all parties shall have the right to be represented by [counsel during any stage of an arbitration] an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

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[5] The proposed rule change contemplates changes to Rules 12208 and 13208 of the Customer and Industry Codes, which restate old Rule 10316. See Securities Exchange Act Release No. 55158 (Jan. 24, 2007); 72 FR 4574 (Jan. 31, 2007) (File Nos. SR-NASD-2003-158 and SR-NASD-2004-011) (Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto; Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto). The changes to Proposed Rule 10407 reflect changes to the new NASD Code of Mediation Procedure. See Securities Exchange Act Rel. No. 52705 (Oct. 31, 2005); 70 FR 67525 (Nov. 7, 2005) (SR-NASD-2004-013). The new NASD Code of Mediation Procedure is currently included in the Code, but will be removed and renumbered as a separate Code now that the Customer and Industry Codes have been approved.

(c) Representation by Others

Parties may be represented in an arbitration by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

(d) Qualifications of Representative

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

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Industry Code

13208. Representation of Parties

(a) Representation by a Party

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

(b) Representation by an Attorney

At any stage of an arbitration proceeding held in a United States hearing location, [All] all parties shall have the right to be represented by [counsel during any stage of an arbitration] an attorney at law in good standing and admitted to practice before the

Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

(c) Representation by Others

Parties may be represented in an arbitration by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

(d) Qualifications of Representative

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

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Code of Arbitration Procedure

10407. Representation of Parties

(a) Representation by Party

Parties may represent themselves in mediation held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

(b) Representation by an Attorney

At any stage of a mediation proceeding held in a United States hearing location, all parties shall have the right to be represented by an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

(c) Representation by Others

Parties may be represented in mediation by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

(d) Qualifications of Representatives

Issues regarding the qualifications of a person to represent a party in mediation are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the mediation proceeding shall not be delayed pending resolution of such issues.

[10407] 10408. Mediator Selection

(a) – (d) No change.

[10408] 10409. Limitation on Liability

No change.

[10409] 10410. Mediation Ground Rules

(a) – (g) No change.

[10410] 10411. Mediation Fees

(a) – (c) No change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

NASD Dispute Resolution believes a rule is needed to clarify the issue of representation of parties in dispute resolution. NASD Rule 10316 states that all parties shall have the right to representation by counsel at any stage of the proceedings. The rule provides no guidance on the kind of representatives who are permitted to practice in the NASD dispute resolution forum, or on the qualifications those representatives must have to participate in the forum. Moreover, Rule 10316 does not address a growing trend in American jurisprudence, the multi-jurisdictional practice of law.

The multi-jurisdictional practice of law occurs when attorneys, licensed in one United States (U.S.) jurisdiction, practice law in a jurisdiction in which they are not licensed. In the area of dispute resolution, for example, it is common for an attorney

licensed to practice law in one state to represent a client in a dispute resolution proceeding in another state in which the attorney is not licensed. Although this practice is permitted in many jurisdictions, it may be a violation of certain other states' unauthorized practice of law provisions. Until recent years, most states had taken no action against this practice. However, two state courts have found that out-of-state attorneys must meet certain conditions in order to participate in a dispute resolution proceeding in their jurisdictions.[6] In light of these developments, the American Bar Association (ABA) amended its Model Rule of Professional Conduct 5.5 (ABA Model Rule 5.5) to promote the multi-jurisdictional practice of law.[7]

Accordingly, NASD proposes to codify its current practice of permitting the multi-jurisdictional practice of law in NASD's dispute resolution forum to the extent permitted under applicable state law. NASD also proposes to codify its current practice which allows non-attorney representatives to represent parties in arbitration or mediation.

Previous Proposal Relating to Representation in Arbitration and Mediation

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6 See Birbrower, Montalbano, Condo & Frank v. Superior Court, 949 P.2d 1 (Cal. 1998); see also Florida Bar v. Rapoport, 845 So. 2d 874, 2003 Fla. LEXIS 250 (Fla. 2003).

7 ABA Model Rule 5.5, as amended, would allow a United States lawyer, admitted in one United States jurisdiction, to engage in certain types of legal activity in another United States jurisdiction where he is not licensed to practice, without being deemed to be engaging in the unauthorized practice of law. For purposes of the dispute resolution forum, ABA Model Rule 5.5, as amended, states, in relevant part, that a lawyer may provide legal services on a temporary basis in an out-of-state jurisdiction that are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in the jurisdiction or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission. This rule is sometimes referred to as the temporary practice rule. Twenty-seven states have either adopted ABA Model Rule 5.5 or a similar version of the rule or currently have a temporary practice rule in effect. American Bar Association, *Charts on State Adoption of MJP Proposals* (visited Aug. 23, 2006) <http:// http://www.abanet.org/cpr/mjp/state_adoption.html >. Other states have adopted a temporary practice rule that, like ABA Model Rule 5.5, allows an attorney not licensed in a state to provide certain types of legal services in the state on a limited basis. The laws of Michigan and Virginia specifically authorize occasional or incidental practice by out-of-state lawyers. See Mich. Comp. Law Ann. sec. 600.916 and Va. State Bar Rule, Pt. 6, sec. 1(C).

On February 9, 2005, NASD filed a proposed rule change with the Commission to address attorney representation in arbitration and mediation.[8] The proposed rule change would have:

- Allowed parties to represent themselves in an arbitration or mediation;
- Allowed parties to be represented by an attorney at law admitted to practice before a U.S. jurisdiction at any stage of the proceeding; and
- Deferred to the states any issues regarding qualifications of a person to represent a party.

NASD amended this proposal on July 8, 2005 to clarify that it was intended to address the issue of multi-jurisdictional practice of law by attorneys, and was not intended to address the issue of representation by non-attorneys in arbitration or mediation proceedings.[9]

As amended, the attorney representation proposal was published in the Federal Register on July 21, 2005.[10] The SEC received fifteen comments, which primarily focused on two issues: whether the rule should preempt state law regarding attorney licensing, and whether the rule should prohibit non-attorneys from practicing in NASD's forum. The comments and NASD's response are discussed in subsection C below.

Based on the comments received on the attorney representation proposal, as amended, NASD recognized that the proposal may have been ambiguous. NASD did not intend to change current practice in the forum regarding representation of parties by non-attorneys, or to preempt state law on the issue of attorney licensing. Because the comments indicated that these positions were unclear, NASD withdrew its proposal. The

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8 See File No. SR-NASD-2005-023.

9 Id. at Amendment No. 1.

10 See Securities Exchange Act Rel. No. 34-52045 (July 15, 2005); 70 FR 42123 (July 21, 2005) (File No. SR-NASD-2005-023).

current proposed rule change addresses representation of parties by themselves, by attorneys and by non-attorneys in arbitration and mediation.

Representation of Parties by Themselves, Attorneys and Non-Attorneys in Arbitration and Mediation

NASD is proposing to amend Rules 12208 and 13208 of the Customer and Industry Codes, respectively, and Rule 10407 of the Code to clarify that in both arbitration and mediation: (1) parties may represent themselves; (2) parties may be represented by an attorney, provided certain criteria are met; (3) parties may be represented by a person who is not an attorney, unless state law prohibits such representation or the person is currently suspended or barred from the securities industry in any capacity or is an attorney who is currently suspended from the practice of law or disbarred; and (4) issues regarding qualifications of a representative are governed by applicable law.

First, the proposed rule change codifies current practice by explicitly stating that parties may represent themselves in arbitration.

Second, the proposed rule change codifies current practice permitting the multi-jurisdictional practice of law by attorneys in the NASD dispute resolution forum to the extent permitted by state law. In addition, the proposed rule change states that if a party chooses to be represented by an attorney, the attorney must be licensed to practice in a U.S. jurisdiction and be in good standing in that jurisdiction.[11] NASD believes that requiring an attorney to be licensed in a U.S. jurisdiction and to be in good standing in

[11] The requirement to be licensed to practice in a U.S. jurisdiction and be in good standing in that jurisdiction is in addition to and not in lieu of the requirement that an attorney must comply with applicable laws of the relevant jurisdiction. As previously noted, while the multi-jurisdictional practice of law may be permitted in many jurisdictions, it may constitute a violation of certain states' unauthorized practice of law provisions.

that jurisdiction will protect investors by prohibiting individuals who have been suspended from the practice of law or disbarred from representing parties in the NASD forum. Further, the requirement that an attorney must be licensed to practice in a U.S. jurisdiction sets a standard of practice for the arbitration forum that is consistent with the other rules and proceedings of NASD. In particular, Rule 9141(b) of the NASD Code of Procedure states, in relevant part, that a person may be represented in any disciplinary proceeding by an attorney at law admitted to practice before the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.[12] The proposed rule change also is consistent with Rule 102(b) of the SEC Rules of Practice, which states that, "[i]n any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State…"[13]

Third, the proposed rule change addresses the representation of parties by non-attorneys in the NASD forum. Under the proposed rule change, parties may be represented in an arbitration or mediation by a person who is not an attorney, unless state law prohibits such representation or the person is currently suspended or barred from the securities industry in any capacity or is an attorney who is currently suspended from the practice of law or disbarred.

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12 This rule has been enforced in NASD Enforcement proceedings. In two similar cases, a respondent's answer was stricken from the record because the respondent's representative had not indicated that he was a licensed attorney. See NASDR Office of the Hearing Officers, OHO Order 97-15 (C01970032) (visited Aug. 24, 2006), available at: <http://www.nasd.com/web/groups/enforcement/documents/oho_disciplinary_orders/nasdw_007839.pdf> ; see also OHO Order 98-10 (C10970176) (visited Aug. 24, 2006), available at: <http://www.nasd.com/web/groups/enforcement/documents/oho_disciplinary_orders/nasdw_007695.pdf>.

13 See SEC Rules of Practice, 17 CFR §201.102(b) (2004).

This provision would be applicable to all arbitration claims. NASD understands, however, that it may be difficult for investors with claims of less than $100,000 to retain an attorney on a contingency-fee basis because the attorney may believe that the attorney's share of the award might be too small to justify the effort. In these circumstances, NASD believes that investors should be able to seek other assistance to resolve their arbitration or mediation claims for a more affordable fee.[14] At the same time, NASD believes that such non-attorney representatives should not be persons who have been found by a regulatory body in essence to be unfit to represent clients or to conduct securities business with the public. Thus, to protect investors, the rule would prohibit non-attorney representatives who are currently suspended or barred from the securities industry, or attorneys who are currently suspended from the practice of law or disbarred, from representing parties in the NASD dispute resolution forum. While NASD remains concerned about some aspects of non-attorney representation, NASD does not wish to prohibit investors from retaining a non-attorney representative if that person is the only affordable representation available, and the requirements of the proposed rule are met.

Last, the proposed rule change would allow an attorney to represent a client in an NASD arbitration or mediation held in any U.S. hearing location, regardless of the jurisdiction in which the attorney is licensed. An attorney's ability to represent clients in

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[14] Consistent with current practice, the proposed rule would allow a relative, friend or associate to represent or assist a person (e.g., an elderly or disabled person) with his or her arbitration or mediation. In addition, law school securities arbitration clinics can provide investors with affordable legal representation. NASD notes that a securities arbitration clinic also can help an investor who has a smaller claim but is unable to hire an attorney, provided the investor qualifies for assistance. See *How to Find an Attorney* (for more information on clinic locations and eligibility requirements) (visited Sept. 13, 2006), available at: <http://www.nasd.com/ArbitrationMediation/StartanArbitrationorMediation/HowtoFindanAttorney/index.htm>.

a jurisdiction in which he or she is not licensed, however, would be subject to the applicable law of that jurisdiction. The proposed rule change is not intended to preempt state law; it is intended to reflect current practice in the forum which, based on experience, indicates that the outcome of a dispute resolution proceeding depends more on the level of knowledge, training and skill of the attorneys, rather than the jurisdiction from which the attorneys received their license to practice.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[15] which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change balances the needs of investors to have access to representation, particularly in small cases, with NASD's responsibility to protect investors, the integrity of its forum, and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received by NASD. The SEC received fifteen comments on the attorney representation proposal that it published for

[15] 15 U.S.C. 78o-3(b)(6).

comment on July 21, 2005.[16] Commenters primarily focused on two issues: whether the rule should preempt state law regarding attorney licensing, and whether the rule should prohibit non-attorneys from practicing in NASD's forum.

With respect to the state preemption issue, several commenters agreed that state law should control whether attorneys may participate in arbitrations in a state in which they are not licensed.[17] These commenters stated that representatives should be licensed legal practitioners who are regulated and have demonstrated a minimum level of competence required to represent clients. Several other commenters opposed the provision of the proposal that would allow state law to control attorney-licensure issues, stating that the provision could result in delays in arbitration proceedings as representatives make the qualifications of an out-of-state representative the focus of the proceedings.[18]

Other commenters addressed whether the proposal would prohibit, in effect, non-attorneys from practicing in NASD's forum. Several commenters contended that the proposal should address non-attorney representation and should allow non-attorneys to

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16 Comments were submitted by Timothy A. Canning, Esq., Law Offices of Timothy A. Canning, dated February 11, 2005 ("Canning I Letter"); Albert A. Rapoport, Esq., dated June 20, 2005 ("Rapoport Letter"); Joseph C. Korsak, Esq., Law Office of Joseph C. Korsak, dated July 22, 2005 ("Korsak Letter"); Michael Firestein, Esq. and Navid Yadegar, Esq., Proskauer Rose LLP, dated August 1, 2005 ("Firestein Letter"); Rodney J. Heggy, Esq., Heggy & Associates, LLC, dated August 4, 2005 ("Heggy Letter"); Richard L. Sacks, Securities Arbitration Consultant, dated August 9, 2005 ("Sacks Letter"); Rosemary Shockman, President, Public Investors Arbitration Bar Association, dated August 9, 2005 ("PIABA Letter"); Joseph O'Donnell, dated August 10, 2005 ("O'Donnell Letter"); Irwin G. Stein, dated August 10, 2005 ("Stein Letter"); Montgomery G. Griffin, Esq., Securities Arbitration Offices of Montgomery G. Griffin, dated August 10, 2005 ("Griffin Letter"); Timothy A. Canning, Esq., Law Offices of Timothy A. Canning, dated August 10, 2005 ("Canning II Letter"); Kevin P. Takacs, CCO, Dominion Investor Services, Inc., dated August 11, 2005 ("Takacs Letter"); Jill I. Gross, Director of Advocacy and Barbara Black, Director of Research, Pace Investor Rights Project, dated August 11, 2005 ("Pace Letter"); and Stephen C. Krosschell, Esq., Goodman & Nekvasil, P.A., dated August 11, 2005 ("Krosschell Letter"). The letter received from Marie W. Hayes, dated March 25, 2005, does not comment on the proposed rule change.

17 See Firestein Letter, Heggy Letter, Pace Letter, PIABA Letter and Rapoport Letter.

18 See Canning I & II Letters, Korsak Letter, Krosschell Letter, Sacks Letter and Stein Letter.

practice in the forum.[19] These commenters argued that the proposal attempted to deny investors access to qualified non-attorney representatives who have securities industry experience and are willing to accept cases that are too small to enable investors to retain a securities attorney. Other commenters contended that the proposal should prohibit compensated non-attorney representation in securities arbitration, stating that the lack of legal training makes non-attorneys less knowledgeable or competent to deal fully with the laws and issues that arise in an arbitration proceeding.[20]

As noted above, based on the disparate comments received on the proposal, NASD recognized that the proposal may not have been clear. NASD did not intend to change current practice in the forum regarding representation of parties by non-attorneys; nor did it intend to preempt state law on the issue of attorney licensing. Because the comments indicated that these positions were unclear, NASD has withdrawn the attorney representation proposal and is filing this new proposal to replace it.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

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19 See, Griffin Letter, O'Donnell Letter, Rapoport Letter, Sacks Letter, Stein Letter and Takacs Letter.

20 See Firestein Letter, Heggy Letter, Korsak Letter, Pace Letter and PIABA Letter.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2006-109 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-109**.** This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal

office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR-NASD-2006-109 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[21]

Florence E. Harmon
Deputy Secretary

[21] 17 CFR 200.30-3(a)(12).